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# Minnesota's Alternatives to Primary Caretaker Placements: Too Much of a Good Thing?

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## MINNESOTA'S ALTERNATIVES TO PRIMARY CARETAKER PLACEMENTS: TOO MUCH OF A GOOD THING?

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### I. INTRODUCTION

Among both married and divorced couples, mothers continue to be the primary caretakers of children.<sup>1</sup> Many of these women

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1. FRANCINE M. DEUTSCH, *HALVING IT ALL* 1 (1999) (stating what has become "the standard scenario in most dual-earner households: the mother and father both work in the paid labor force, but the mother also works a 'second shift' at home, a shift that is not shared fully by her husband") (citing multiple studies); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 769 n.166, 772-73 (1988) (stating that the vast majority of working women are primary parents). Courts may also view more favorably the efforts of fathers who help with parenting but still are not primary caretakers. Mary Ann Mason & Ann Quirk, *Are Mothers Losing Custody? Read My Lips: Trends in Judicial Decision-Making in Custody Disputes—1920, 1960,*

lack the financial ability to protect their children's interests. Developments in Minnesota law, however, reveal indifference to these realities and create numerous obstacles to primary caretaking mothers who seek to establish that their custodial care is in the best interests of the child. Lawmakers have been enthusiastic for joint custody and parenting plans while denigrating the preference for primary caretakers and threatening primary caretakers with easy loss of adequate child support, impermanence of their custodial care, and denial of freedom to move elsewhere without risking a change of custody.

Protection of primary caretaking eroded in several stages. In the 1970s, the legislature abolished the 1950's and 1960's preference for the mother. At the end of the 1980s, the legislature declared an end to the preference for the primary caretaker. To date, the judiciary has not challenged that determination or since addressed the importance of the primary caretaker in the child's life. More recently, the legislature has created a presumption that joint legal custody is in the child's best interests,<sup>2</sup> and the *Hortis/Valento*<sup>3</sup> and *Rogers*<sup>4</sup> line of cases have added collateral child support rewards for the non-custodial parent who obtains the label of joint physical custodian. Finally, in 1999, the legislature created parenting plans,<sup>5</sup> further denigrating the preference placed on primary caretakers.

As child custody standards continue to evolve, legislators and judges should give primary caretaker placements much more consideration, and the law should pay special attention to the class of mothers who are primary parents.

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1990, and 1995, 31 FAM. L.Q. 215, 235 (1997) ("Perhaps 'working mother' has replaced 'moral unfitness' as a criteria for granting custody to fathers.").

2. MINN. STAT. § 518.17, subd. 2 (2000).

3. *Valento v. Valento*, 385 N.W.2d 860, 863 (Minn. Ct. App. 1986) (requiring a parent to pay the child support amount indicated by the guidelines only during the periods of time that the other parent has custody of the children); *Hortis v. Hortis*, 367 N.W.2d 633, 636 (Minn. Ct. App. 1985) (offsetting the smaller obligation of one parent against larger obligation of other parent).

4. *Rogers v. Rogers*, 622 N.W.2d 813 (Minn. 2001).

5. MINN. STAT. § 518.1705 (Supp. 2001). This statute offers divorcing parents the option of creating a parenting plan "in lieu of an order for child custody and parenting time." *Id.* at subd. 3(a). The terms of parenting plans are negotiated by the parents and must include "a schedule of the time each parent spends with the child; a designation of decision making responsibilities regarding the child; and a method of dispute resolution." *Id.* at subd. 2.

## II. JUDICIAL TREATMENT OF THE CHILD'S INTEREST IN PROTECTING THE PRIMARY CARETAKER RELATIONSHIP

Primary caretakers provide "daily nurturance, care and support"<sup>6</sup> for their children. Minnesota courts adopted a preference for placing children with their primary caretakers because child psychologists found that maintaining the child's relationship with the primary caretaker provided "emotional and psychological stability to the child's sense of security, happiness, and adaptation."<sup>7</sup> Placing children with their primary caretakers furthered the best interests of children.

Only thirty years ago, Minnesota courts employed the tender years doctrine because society assumed that young children would be better off with their mothers.<sup>8</sup> At that time, only a small percentage of women worked outside the home. The tender years preference can be traced to the Minnesota Supreme Court's early (and bold) commitment to the best-interests standard when the court overrode a statutory mandate that fathers receive custody and awarded custody to a mother due to her role as the primary caretaker.<sup>9</sup> This preference was absolute for some trial judges, who boldly declared bad news for fathers who had the temerity to suggest that they be the custodial parent.

The social order has changed, but less completely than some might assume. Many women are employed outside the home, and many men are primary caretakers, both before and after divorce. Recent Father's Day articles highlighted the 2.2 million single fathers who have primary custody of their children, a sixty-two percent increase since 1990.<sup>10</sup> The changing image of families has prompted legal changes to accommodate the special circumstances of children affected by these new arrangements. But another statistic is too easily overlooked: most children continue to have a primary parenting relationship with their mothers, and women

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6. *Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985).

7. *Id.* (citing JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 31-35 (1979)).

8. *Meinhardt v. Meinhardt*, 261 Minn. 272, 276, 111 N.W.2d 782, 784 (1961) ("[O]ther things being equal, the welfare of children of tender years is best served by their being left in the care of their mother.").

9. *Flint v. Flint*, 63 Minn. 187, 189-90, 65 N.W. 272, 273 (1895).

10. Tara Gatewood, *More Single Dads are Receiving the Ultimate Father's Day Gift—Their Kids*, ST. PAUL PIONEER PRESS (Minn.), June 17, 2001, at E1, available at <http://www.pioneerplanet.com/seven-days/tod/news/docs/66494.htm>; Adam Stern, *Single Dad: Popular But Misunderstood*, N.Y. TIMES, June 17, 2001, at ST1.

head the overwhelming majority of single-parent families.<sup>11</sup> In fact, single mothers head 26% of all families with children under age eighteen, while single fathers head only 5%.<sup>12</sup> More to the point, early data from the 2000 census show that for divorced families, fathers head 913,000 households and mothers head 3,392,000 households, amounting to approximately 21% and 79% respectively.<sup>13</sup>

#### A. *Preference for Placement with the Mother*

The first reaction to the courts' strong preference for mothers came with the Minnesota Legislature's 1969 amendments directing the court to place no weight on the sex of the parent in determining custody.<sup>14</sup> The legislature revised the statute again in 1974 to detail specific factors for the courts to consider in determining a custodial placement.<sup>15</sup> Despite these statutory changes, the dominant rule of law changed little in the courts. Giving increased meaning to these changes, the supreme court explained that trial courts must make findings of fact on those factors that are brought into dispute<sup>16</sup> because detailed findings facilitate judicial review and unmask hidden biases in decision-making. Similarly, the *Berndt*<sup>17</sup> and *Weatherly*<sup>18</sup> cases suggest a supreme court interest in protecting primary caretaking mothers from judges inclined to arbitrarily overlook the interest of the child in being with the child's mother.

Judicial recognition of the interests served by primary-caretaker placement culminated with the supreme court's decision

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11. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS FOR THE UNITED STATES: 2000 tbl.DP-1 (2000), at [http://www.census.gov/Press-Release/www/2001/tables/dp\\_us\\_2000.PDF](http://www.census.gov/Press-Release/www/2001/tables/dp_us_2000.PDF) (showing that 7,561,874 families with children under age eighteen are headed by single females).

12. Jason Fields & Lynne M. Casper, *Families and Living Arrangements*, CURRENT POPULATION REP. (U.S. Census Bureau), June 2001, at 7, at <http://www.census.gov/prod/2001pubs/p20-537.pdf>.

13. *Id.* at 8 tbl.4.

14. Act of June 6, 1969, ch. 1030, § 1, 1969 Minn. Laws 2081, 2081 (codified at MINN. STAT. § 518.17 (1969)) (stating that courts "shall not prefer one parent over the other" in custody decisions).

15. Act of Mar. 28, 1974, ch. 330, § 2, 1974 Minn. Laws 555, 555-56 (codified at MINN. STAT. § 518.17, subd. 1 (1974)).

16. *Rosenfeld v. Rosenfeld*, 311 Minn. 76, 82, 249 N.W.2d 168, 171 (1976) ("[W]e conclude that the family court must make written findings which properly reflect its consideration of the factors listed in Minn. St. 518.17, subd. 1.").

17. *Berndt v. Berndt*, 292 N.W.2d 1, 2 (Minn. 1980).

18. *Weatherly v. Weatherly*, 330 N.W.2d 890, 892 (Minn. 1983).

in *Pikula*, with the court declaring that children should be placed with their primary parent.<sup>19</sup> The supreme court hoped that the preference would “reduce litigation and provide more predictable results,” in recognition of the tension between giving the courts discretion to make individualized decisions in the interests of justice while providing predictable decision-making.<sup>20</sup> The presumption also recognized and attempted to neutralize the difference in bargaining power between primary caretakers and the traditional breadwinner spouse. Traditional primary parents, who are preoccupied with needs of the home and children and concerned about meeting future expenses, are vulnerable to intimidation by an opposing party who threatens litigation to compel the primary caretaker to concede maintenance, support, or property settlements in exchange for custody.<sup>21</sup>

### *B. Corresponding Rights of Sole Custodians*

Developments through 1985 established the central features of child-custody law that protect primary parents by articulating their rights as sole custodians. Child support guidelines provide a full and more dependable right of support for sole physical custodians, and the legislature has continued to support the guidelines approach. The courts and legislature strengthened the validity of the original custody determinations by mandating thorough trial court findings and eliminating the court of appeals’ ability to approve decisions that were supported by the record but lacked adequate findings.<sup>22</sup>

The legislature, sharing judicial concern for a child’s stable relationships, protected the permanency of the primary caretaking

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19. *Pikula v. Pikula*, 374 N.W.2d 705, 713 (Minn. 1985) (“[W]e hold the factors set forth in section 518.17, subd. 1, require that when both parents seek custody of a child too young to express a preference for a particular parent and one parent has been the primary caretaker, custody be awarded to the primary parent absent a showing that that parent is unfit to be the custodian.”).

20. Gary Crippen, *Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota’s Four Year Experiment with the Primary Caretaker Preference*, 75 MINN. L. REV. 427, 429-30 (1990).

21. *Id.* at 449-50.

22. Compare *Rosenfeld v. Rosenfeld*, 311 Minn. 76, 82, 249 N.W.2d 168, 171-72 (1976) (establishing the need for findings on all the best interest factors), with *Moylan v. Moylan*, 384 N.W.2d 859, 865 (Minn. 1986) (reversing and remanding the court of appeals’ affirmance of a child support modification based on the record because the trial court’s decision did not reveal “whether the trial court considered factors expressly mandated by the legislature” (citation omitted)).

relationship after the court entered the original custody determination by making modification of the arrangement permissible only when the non-custodial parent could show that the child's present circumstances endanger the child's health.<sup>23</sup> The supreme court further honored the relationship by creating a presumption that a primary caretaker could remove the child from the state.<sup>24</sup> In order to defeat the presumption, the non-custodial parent had to show that the move would endanger the child<sup>25</sup> or the custodial parent intended to interfere with the non-custodial parent's visitation by moving.<sup>26</sup> This protection developed because child psychologists found that it would be detrimental to the child's psychological development to interrupt the existing parent-child relationship by altering custody.<sup>27</sup> During this time, courts strongly discouraged joint physical custody<sup>28</sup> because dividing time between the parents was thought to harm the child.

### III. POSTMORTEM FOR THE PRIMARY CARETAKER PREFERENCE

The *Pikula* presumption favoring primary caretakers produced a backlash that badly diminished the strength of these caretakers' cases for a sole custody placement. From the beginning, the preference produced a frenzy of litigation (a cottage industry for lawyers, who already were drawn much more frequently into this field because of the explosion of divorces beginning in the 1970s) where fathers attempted to establish leverage by demonstrating that they were, at a minimum, equally involved in the superficial measures of primary caretaking. When fathers were able to make such a showing, no primary caretaker preference was given;<sup>29</sup> the

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23. MINN. STAT. § 518.18(c) (2000); Crippen, *supra* note 20, at 442; *cf.* State *ex rel.* Nelson v. Whaley, 246 Minn. 535, 545, 75 N.W.2d 786, 792 (1956) (stating there must be "a grave reason growing out of neglect, abandonment, incapacity, moral delinquency, instability of character, or inability to furnish the child with needed care" to award custody to a stranger rather than a parent).

24. Auge v. Auge, 334 N.W.2d 393, 399-400 (Minn. 1983).

25. Sefkow v. Sefkow, 427 N.W.2d 203, 214 (Minn. 1988).

26. MINN. STAT. § 518.175, subd. 3 (2000).

27. Auge, 334 N.W.2d at 396 n.3 (citing GOLDSTEIN, *supra* note 7, at 8-11).

28. Gerardy v. Gerardy, 391 N.W.2d 915, 918 (Minn. Ct. App. 1986) (disapproving of bandying a child back and forth between parents); *see also* McDermott v. McDermott, 192 Minn. 32, 36, 255 N.W. 247, 248 (1934) (finding joint physical custody appropriate only in exceptional cases because of the inherent divisiveness).

29. *Pikula v. Pikula*, 374 N.W.2d 705, 713-14 (Minn. 1985) ("When the facts demonstrate that responsibility for and performance of child care was shared by

supreme court never found occasion to review this major development in the application of its decision in *Pikula*.

Four years after *Pikula*, the legislature amended the list of best interest factors by adding a statement that prohibited the court from using "one factor to the exclusion of all others."<sup>30</sup> This change occurred because fathers contended that *Pikula* caused the courts to unduly confine their consideration of statutory best interest factors and thus deprive fathers of success in their efforts to obtain placements of child custody.<sup>31</sup> The amendment further required the court to make detailed findings on all factors.<sup>32</sup> Even after the legislature eroded the preference for the primary

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both parents in an entirely equal way, then no preference arises and the court must limit its inquiry to other indicia of parental fitness.").

30. Act of May 25, 1989, ch. 248, § 2, 1989 Minn. Laws 834, 836 (codified at MINN. STAT. § 518.17 (Supp. 1989)).

31. *Hearing on S.F. No. 573 Before the Civil Law Subdivision of the S. Judiciary Comm., 76th Leg., Reg. Sess.* (Minn. Apr. 5, 1989) (statement of Sen. Spear). Senator Spear stated:

Now the effect of the *Pikula* decision has been that all of the statutory definitions of the best interests of the child which appear in section 518.17, subdivision 1, had to be ignored, and the *Pikula* standard is the one standard that the courts are considering. This has been a major complaint of the groups that represent fathers and noncustodial parents and I think it's a legitimate one because the primary caretaker standard tends to be a mother-oriented standard in our society, at least in most households, and the *Pikula* standard makes it harder for a father to get custody of the child.

What this section does is that it puts the *Pikula* standard within the context of the other standards that we have in the statute, the best interests of the child, it lists it, it makes the *Pikula* standard the 11th definition factor [the committee later rearranged the factors] to be considered by the court in the determining the best interests of the child and then says that none of these factors should be controlling in determining custody. Instead of the primary caretaker standard overriding everything else, it is merely one of the things that the courts would take into consideration in determining the best interests of the child.

*Id.* Senator Berglund then expressed concern about the custody of very young children. In response, Senator Spear stated that the new language would not "force the court to tear a baby away from a mother's breast." *Id.* For a discussion of the Minnesota State Bar Association's support for this change, see Crippen, *supra* note 20, at 494 n.227; cf. Fineman, *supra* note 1, at 730, 768-69 (noting that custodial mothers as a group are unorganized, unrepresented, and disadvantaged in the political process).

32. The amendment states: "The court must make detailed findings on each of the factors and explain how the factors led to its conclusions and to the determination of the best interests of the child." Act of May 25, 1989, ch. 248, § 2, 1989 Minn. Laws 834, 836 (codified at MINN. STAT. § 518.17 (Supp. 1989)).



caretaker, when reflecting on the best-interest factors, the supreme court in *Maxfield* stated that primary caretaking is “the golden thread running through any best interests analysis”<sup>33</sup> because it bears on all other factors. In response, the legislature further clarified its intent, amending the statute once again to declare that “[t]he primary caretaker factor may not be used as a presumption in determining the best interests of the child.”<sup>34</sup> Notably, the court has neither withdrawn nor altered its “golden thread” analysis, despite the legislature’s subsequent amendment to the best-interest factors.<sup>35</sup> Likewise, the court has yet to discount its earlier announcement of a goal to make custody decision-making more predictable.

Even though the “golden thread” analysis has never been refuted, Minnesota courts have heeded the legislature’s admonishment and there is no record that the preference was subsequently used to justify a preference-like decision premised on other factors. Furthermore, no appellate decision records an attempt to determine the legislative prerogative to declare as a matter of fact, based on political considerations, that a primary caretaker presumption offends strong evidence on the best

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33. *Maxfield v. Maxfield*, 452 N.W.2d 219, 223 (Minn. 1990).

34. Act of May 3, 1990, ch. 574, § 13, 1990 Minn. Laws 2123, 2132 (codified at MINN. STAT. § 518.17 (1990)). Senator Knaak introduced the amendment on the Senate floor. 5 STATE OF MINN. JOURNAL OF THE SENATE: 76TH LEG. SESS. 7979 (daily ed. Apr. 9, 1990). After Senator Knaak explained the text of the amendment, Senator Spear clarified the intent:

Senator Spear: I think if I understand this amendment correctly, I think I support it. Last year we redrafted this section of the law and we included—we added the provision that you see on page two lines 11-12: “The court may not use one factor to the exclusion of all others.” Because what had been happening since the *Pikula* decision was that the primary caretaker factor seemed to be used to the exclusion of all others.

Now since that time there has been a decision called the *Maxfield* decision and in that decision the court read what we did last year but didn’t seem to believe it and didn’t seem to believe that we meant what we said and so I think, Senator Knaak, is this an attempt to give the court *another* message and to tell them that the *Maxfield* decision was an *incorrect* interpretation of what we did last year?

Senator Knaak: Mr. President, Senator Spear—It’s in English and I believe the court can read it.

Audio tape: Senate Floor Session on H.F. 1855 (Minn. Apr. 9, 1990) (tape 1, side B). After a little more discussion, the amendment passed. *Id.*

35. *Infra* note 34 and accompanying text.

interests of the child,<sup>36</sup> even though the Minnesota Supreme Court has consistently defended its ability to look past statutory standards as an exercise of equitable powers in determining the best interests of the child and the legal interests of divorcing parents.<sup>37</sup> Thus, the flight is substantial, from a preference favoring primary caretakers to a legislated declaration that the preference is anathema.

In retrospect, it is intriguing to inquire about the analysis that prompted efforts to decimate the primary caretaker preference and support, instead, those arrangements that go further to demand active contact with both parents, even if the child has a primary caretaker parent. Are these developments entirely in the realm of determining justice for parents? Alternatively, if the best interests of children lie behind what has occurred, is it significant that a preference for the stable relationship with a primary parent was expressly based in prominent social research and thought?<sup>38</sup> Is

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36. *Cf. State ex rel. Flint v. Flint*, 63 Minn. 187, 189, 65 N.W. 272, 273 (1895) (upholding custody award to the mother notwithstanding the statutory imperative that the father shall have custody). A child's "right to a just determination of her best interests is fully as important as a person's right to be free from incarceration by the State." *Brown v. Chastain*, 416 F.2d 1012, 1027 (5th Cir. 1969) (Rives, J., dissenting). *But see In re Welfare of J.M.*, 574 N.W.2d 717, 722 (Minn. 1998) (finding that canons of statutory interpretation barred the court from ordering "a statutorily-prohibited placement" of long-term foster care for a child under 12 years of age).

37. Early on, Justice Cardozo stated the equity court's inherent power to order a statutorily-prohibited remedy in the best interests of the child. *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925). Minnesota courts have invoked their inherent power to grant equitable relief "as the facts in each particular case and the ends of justice may require." *Johnston v. Johnston*, 280 Minn. 81, 86, 158 N.W.2d 249, 254 (1968); *see also DeLa Rosa v. DeLa Rosa*, 309 N.W.2d 755, 758 (Minn. 1981) (finding district court has inherent power in family law cases to grant relief as facts and equities require); *Flint*, 63 Minn. at 189-90, 65 N.W. at 273 (holding statutory mandate that custody be awarded to the father did not prohibit court's decision to place the child with its mother); *Kimmel v. Kimmel*, 392 N.W.2d 904, 908 (Minn. Ct. App. 1986) (finding court had equitable power to disregard statutory procedure when child's welfare in jeopardy). Infringing on the court's equitable powers can violate separation of powers. *Holmberg v. Holmberg*, 588 N.W.2d 720, 725-26 (Minn. 1999) (finding statutory process violated separation of powers by infringing on court's original, equitable jurisdiction in family law).

38. *See generally Pikula v. Pikula*, 374 N.W.2d 705, 711 (Minn. 1985) (citing GOLDSTEIN, *supra* note 7 (documenting the need for the child to maintain relationship with primary parent)); *Auge v. Auge*, 334 N.W.2d 393, 396 n.3 (Minn. 1983); *see also In re Custody of D.G.*, 246 N.W.2d 892, 895-96 (N.D. 1976) (embracing *Beyond the Best Interests of the Child* and the importance of continuity in a child's life to reverse a child custody placement with the father and to place permanent custody with grandparents).

there predominating evidence to debunk this support, suggesting the merit for a higher preference for keeping the child in contact with a secondary parent? Or do either lines of thought rise above the level of anecdotal psychological opinion, susceptible to faddishness?

Perhaps a more pragmatic consideration lies behind many developments in child custody law. Part of the rationale for any preference, expressly so in respect to the preference for primary parents, rests in the need for certainty and for avoidance of litigation.<sup>39</sup> Loss of confidence in the preference may have been due to the Minnesota approach to the preference, which made the preference less certain and precise than expected.<sup>40</sup> And a preference for shared custody may reflect an alternative view, especially on the part of lawyers and trial judges, that shared arrangements induce parents quarreling in respect to their own justice interests to settle their differences.

Just as the primary caretaker preference lost favor without refutation of one of its scientific bases, another anomaly is evident. As previously observed, the Minnesota Supreme Court has recognized that identification of the primary caretaker is the "golden thread" running through the best interest considerations.<sup>41</sup> Is there any reason to doubt that this observation is accurate?

#### IV. JOINT PHYSICAL CUSTODY

A new interest of policymakers in joint physical custody arose in the wake of efforts to diminish the preference for mothers as sole custodians of their children after divorce. This development suggests a lapse in the influence of *Beyond the Best Interests of the Child* and the end of influence of the *McDermott* line of cases disfavoring this arrangement.<sup>42</sup> As part of this development, the

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39. See *supra* text accompanying notes 19-20 (discussing rationale for preference); see *infra* note 48 (discussing uncertainty of outcomes).

40. Crippen, *supra* note 20, at 452-95 (discussing the Minnesota approach and its problems).

41. See *Maxfield v. Maxfield*, 452 N.W.2d 219, 223 (Minn. 1990); *supra* text accompanying note 33.

42. Minnesota law mandates use of a rebuttable presumption that requested joint legal custody is in the best interests of the children, but does not favor or disfavor joint physical custody. MINN. STAT. § 518.17, subd. 2 (2000). Approximately six states and the District of Columbia have a joint custody presumption, two states have a preference for joint custody, and six states employ a presumption that joint custody is in the best interests of the child if the parents

collateral legal considerations provided for sole custodians have become avoidable, often with support of Minnesota's appellate courts. In joint physical custody cases, the *Auge* presumption that a primary parent can relocate to another state with the child does not apply because stability for the child requires regular contact with both parents.<sup>43</sup> Instead, the court applies the best interests standard.<sup>44</sup> Likewise, both parents are child support obligors and the primary physical custodian is not entitled to a straightforward guidelines amount of child support.<sup>45</sup> Both the legislature and the courts, however, have upheld the danger standard as a means to protect the permanency of arrangements.<sup>46</sup>

Attendant characteristics of sole and joint custody have become even more important because appellate courts insist on following the label, no matter the real nature of the placement<sup>47</sup>—arguably, in the instance of child support, depriving the primary caretaker of an entitlement definitively determined by the

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agree to it. Margaret Martin Barry, *The District of Columbia's Joint Custody Presumption: Misplaced Blame and Simplistic Solutions*, 46 CATH. U. L. REV. 767, app. at 825-830 (1997).

43. Hegerle v. Hegerle, 355 N.W.2d 726, 731 (Minn. Ct. App. 1984).

44. MINN. STAT. § 518.18(d) (2000).

45. The *Hortis* decision recognized that when a joint custody arrangement results in each parent being a non-custodial parent for six months of the year, that parent should pay child support only during those six months when the child resides with the other parent. *Hortis v. Hortis*, 367 N.W.2d 633, 635 (Minn. Ct. App. 1985); see also *Valento v. Valento*, 385 N.W.2d 860, 862 (Minn. Ct. App. 1986) (applying the same method to a joint custody arrangement even though the parents divided physical care 57%/43%).

46. MINN. STAT. § 518.18(e) (2000); see also *Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. Ct. App. 1992) (employing the endangerment standard when a parent, who was designated the sole physical custodian, wished to substantially restructure an equally-shared custody arrangement by moving the children several miles away and to a new school district); cf. *Frauenschuh v. Giese*, 599 N.W.2d 153, 157-58 (Minn. 1999) (finding only joint physical custodians can agree to the best interests standard for modification).

47. *Blonigen v. Blonigen*, 621 N.W.2d 276, 281-82 (Minn. Ct. App. 2001); see also *Rogers v. Rogers*, 622 N.W.2d 813, 821 (Minn. 2001) (finding that parent not entitled to *Hortis/Valento* benefits without successful negotiating or otherwise obtaining a joint physical custody award and holding guidelines will be upheld for sole-custody awards); *Ayers v. Ayers*, 508 N.W.2d 515, 520 (Minn. 1993) (applying the best interests standard instead of the endangerment standard when evaluating a primary caretaker's request to modify the decree and move the child because the stipulation stated "joint physical custody"); *Wilson v. Wilson*, No. C6-97-562, 1997 WL 559735, at \*3 (Minn. Ct. App. Sept. 9, 1997) (unpublished opinion) (applying the endangerment standard to a custody-modification case because of the sole-physical-custodian label even though the parent opposing removal of the child from the state was a de facto joint-physical custodian).

legislature. Tolerance for joint physical custody creates a prospect for unwarranted compromise in favor of a non-primary caretaker who claims an interest in having generous privileges to be with the child. But there is a greater collateral effect: openness to the arrangement invites a syndrome of bargaining pressure in determining custody and support decisions or using custody issues to gain other advantages.<sup>48</sup> To guarantee a just application of the child support guidelines for primary physical custodians, courts must look past the label.<sup>49</sup>

## V. PARENTING PLANS

Effective for 2001, the Minnesota Legislature created parenting plans as an option for divorcing couples.<sup>50</sup> The plans create flexibility and use language designed to decrease conflict in divorce. "Parenting time"<sup>51</sup> has replaced visitation, a child's "primary residence" has replaced the custodial home, and if the parties do not like the new terminology, they are free to use whatever language they desire, as long as the parenting plan defines the relationships and responsibilities they create.<sup>52</sup> Finally, with reference to the last vestige of legislative preference for preserving stable circumstances of the children in divorce cases, the statute provides that the parties may agree that the court should use the best interests of the child standard for modification of any part of the plan.<sup>53</sup>

Whatever the merit of parenting plans in eliminating traditional labels, the plans can fully compromise preservation of

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48. "[U]ncertainty about the outcome of custody disputes leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments." *Garska v. McCoy*, 278 S.E.2d 356, 360 (W. Va. 1981). "Widespread reports exist of women giving in on alimony and other economic claims in the face of husbands' new demands for custody of the children (whether they actually want it or not)." JOAN WILLIAMS, UNBENDING GENDER 211 (2000); see also Jessica Pearson & Maria A. Luchesi Ring, *Judicial Decision-Making in Contested Custody Cases*, 21 J. FAM. L. 703, 721 (1983) (citing older judges' opinions that "fathers who wanted custody were simply trying to avoid child support payments or to ensnare their ex-wives in an abusive relationship" but also citing one contrary opinion).

49. *Blonigen*, 621 N.W.2d at 283-85 (Crippen, J., dissenting).

50. MINN. STAT. § 518.1705 (Supp. 2001). For a general history and description of the statute, see Peter V. Rother, *Balancing Custody Issues: Minnesota's New Parenting Plan Statute*, 57 BENCH & B. OF MINN. 27, 28 (Dec. 2000).

51. MINN. STAT. § 518.003, subd. 5 (2000).

52. MINN. STAT. § 518.1705, subd. 2(c) (2000).

53. *Id.* at subd. 9.

the primary caretaker-child relationship. Even though the language used to describe the relationships changed, and neither primary caretakers nor custodial mothers exist as legal categories, "they exist as an institution—as a practical reality experienced by many children of divorce and their mothers."<sup>54</sup> As with all negotiated settlements, however, the primary caretaker must bargain over parenting time and where the child's primary residence will be. In this instance, there is no presumption that the court will apply the child support guidelines to respect the reality of the situation, respect the interest of the child in joining a parent in a move, or apply the child-endangerment standard for modification. For those parties who choose to apply the child support guidelines, even when the plan does not use the label of joint custody or sole-physical custody, it is not evident that the law favors full child-support-guidelines benefits or discourages viewing each parent as a child-support obligor.<sup>55</sup>

Even though the courts are involved almost exclusively in high conflict divorces<sup>56</sup> and parenting plans are designed for those divorcing couples who are committed to cooperating with each other, the legislature provided for court-ordered parenting plans.<sup>57</sup> The House and Senate disagreed over whether to give the courts the power to create a parenting plan, and senators found assurance in the fact that the court would have only those powers it had already under the traditional arrangements.<sup>58</sup> Eventually, the committee approved the provision granting the court the power to create a parenting plan after Senate and House counsel drafted onto the Senate version language intending to declare that new court powers were not being created.<sup>59</sup> Although the legislature

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54. Fineman, *supra* note 1, at 733 (noting "[t]he change in rhetoric disadvantages functioning custodial mothers and their children, the occupants of the shadow institution of sole-custody parenting, who have not had a voice in custodial laws.").

55. Rother, *supra* note 50, at 29.

56. Gerald W. Hardcastle, *Joint Custody: A Family Court Judge's Perspective*, 32 FAM. L.Q. 201, 214 (1998) ("To judges hearing contested matters, the conflicted couple is not an incidental aberration. The conflicted couple is the norm. In this context of contested custody litigation, joint custody clearly raises concern.").

57. MINN. STAT. § 518.1705, subd. 3(b) (2000).

58. *Parenting Plans, 2000: Hearing on S.F. 3169/H.F. 3311 Before the Senate Conference Committee*, 81st Leg., Reg. Sess. (Minn. 2000), available on audio tape: *Hearing Before the Senate Conference Committee on S.F. 3169/H.F. 3311* (Apr. 6, 2000) (tape 1, side B).

59. *Parenting Plans, 2000: Hearing on S.F. 3169/H.F. 3311 Before the Senate Conference Committee*, 81st Leg., Reg. Sess. (Minn. 2000), available on audio tape:

did not intend to give the court any new powers, at least one commentator has noted a potential ambiguity that could give the court power to mandate a parenting plan when the parties did not agree to it.<sup>60</sup> The impact of court-ordered parenting plans remains to be seen.

## VI. PRIMARY CARETAKERS AT THE POVERTY LEVEL

Primary caretakers living at the poverty level face added barriers and fewer options for custodial arrangements when seeking custody of their children. Even for those who obtain representation through a legal services program,<sup>61</sup> any desire for equally-shared parenting after divorce may not be an option because the parents cannot afford to maintain two households. What is more, the concept of equal caretaking may be inappropriate at best for families that do not fit the unspoken norm of white, middle class households on which the concept is based.<sup>62</sup>

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Hearing Before the Senate Conference Committee on S.F. 3169/H.F. 3311 (Apr. 10, 2000) (tape 1, side A) (statements of Rep. Dawkins and Ms. McKnight).

60. Rother, *supra* note 50, at 28 (comparing MINN. STAT. § 518.1705, subd. 3(b) (2000) ("If both parents do not agree to a parenting plan, the court may create one on its own motion . . ."), with MINN. STAT. § 518.1705, subd. 5 (2000) ("If both parents agree to the use of a parenting plan but are unable to agree on all terms, the court may create a parenting plan under this section.")).

61. Minnesota courts have acknowledged that costs eventually will preclude access to the courts for the resolution of family law disputes for all but the very wealthy. *Sinsabaugh v. Heinerscheid*, 428 N.W.2d 476, 481 (Minn. Ct. App. 1998) (Foley, J., concurring specially) ("It strikes me that if restraint is not practiced in the area of family law litigation, the time will come when only the very wealthy will be able to litigate these matters, and yet custody issues are often at the very heart of family law disputes at all social and economic levels.").

62. Minnesota employs a joint custody presumption when one of the parties requests it, but this arrangement is not appropriate for all families. For example, the presumption is not appropriate for the predominantly Black community of Washington D.C., where much of the population lives in poverty. Barry, *supra* note 42, at 773. Professor Barry first notes that the presumption is "based on white, middle class precepts of gender rights and privileges regarding the raising of children" that does not account for the reality of D.C. households. *Id.*; see also Hardcastle, *supra* note 56, at 213 ("[O]ne is left with the feeling that joint custody is an upper-middle class phenomenon. Seeking to impose this custody arrangement on young, uneducated parents or socio-economically disadvantaged parents is arrogant and may add stress to the post-divorce process.").

Professor Barry highlights the increased costs for post-divorce households and notes that the increase significantly impacts families living at or below the poverty line. Barry, *supra* note 42, at 788-89. She also notes that the presumption that joint custody is in the best interests of the child does not take into account

Because the custodial label or parenting plan arrangement affects the parent's ability to meet the child's basic needs, access to public assistance programs should be considered. In order to be eligible for benefits under the Minnesota Family Investment Program (MFIP), the "minor child and a caregiver must live together."<sup>63</sup> If the child resides out of the home for too long, when on vacation or visiting with a non-custodial parent, the custodial parent may lose eligibility for benefits. Without benefits, there is a great danger that the child will have no home to return to when the visitation period ends. Although the statute does address eligibility for benefits when the court order specifies joint legal or joint physical custody,<sup>64</sup> it does not specify how the court should determine eligibility when the parties do not employ the joint custody label. If society has a genuine interest in promoting shared parenting, financial considerations should be addressed for parents living at or below the poverty level. Otherwise, the ideal of equally-shared parenting is effectively eliminated because only one parent can receive benefits and the parents cannot afford to maintain two separate homes.

MFIP could be structured to provide a safety net for divorced parents if the concepts of equally-shared parenting and joint custody were made accessible to all children and their parents. But welfare reform that extends benefits to more people is politically unpopular and unlikely to occur. Further, because legislators refuse to consider the impact of custody laws on families of diverse economic circumstances, they create other obstacles to arranging custody in the best interests of these children. The conference committee that worked on the parenting plan legislation provides the following example of this process in action.

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"the hardship faced by the parent who shoulders the bulk of the financial responsibility by virtue of de facto sole physical custody, with little contribution from the parent who fails to meet the obligations ordered by the court. *Id.* at 789. A return to court could solve the problem of obtaining child-support arrearages if the other parent has the ability to pay, but cost precludes the ability of primary caretakers living at the poverty level from returning to court. *See id.* Although Minnesota does not have a joint physical custody presumption, the problems Professor Barry highlights for the population she works with apply to impoverished families as a whole. As Minnesota progresses to the legislative ideal of equally-shared parenting, courts should not overlook parental discord as an important impediment to the effectiveness of a parenting plan or a joint custody arrangement.

63. MINN. STAT. § 256J.13, subd. 2 (2000).

64. MINN. STAT. § 256J.15, subd. 1 (2000).



When Nancy Mischel of the Legal Services Advocacy Project attempted to alert the committee to the possible impact a parenting plan could have on a parent's eligibility for public assistance, the committee members responded with resentment instead of concern, murmuring "Aren't we trying to get people off welfare?"<sup>65</sup> When the subject came up again at the next meeting, Senator Foley expressed concern about the stability of a family living on the margins and proposed to delay the effectiveness date for the legislation.<sup>66</sup> But the majority view prevailed out of fear that a parent would attempt to control a custody determination by applying for public assistance before the court made its final decision. Allowing these fears to prevail hampers the best interests of children because "[t]he single most important determinant of child well-being after divorce is living in a household with adequate income."<sup>67</sup>

Although policymakers should consider all the possible messages that legislation could send to citizens, they should not allow hypothetical, worst-case scenarios of welfare abuse to override concrete concerns. Arguments against considering public assistance in conjunction with custody law when the parents have the ability to meet a child's basic needs "fall apart when children are in danger of being deprived of the essentials of existence."<sup>68</sup> The reality is that divorce impoverishes women and children. Data from the 2000 census show that more than twice as many single mothers as single fathers have incomes below the poverty level—thirty-four percent of single mothers compared with sixteen percent of single fathers<sup>69</sup>—and one in six (twelve million) children

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65. *Parenting Plans, 2000: Hearing on S.F. 3169/H.F. 3311 Before the Senate Conference Committee*, 81st Leg., Reg. Sess. (Minn. 2000), available on audio tape: Hearings Before the Senate Conference Committee on S.F. 3169/H.F. 3311 (Apr. 6, 2000) (tape 1, side B).

66. *Parenting Plans, 2000: Hearing on S.F. 3169/H.F. 3311 Before the Senate Conference Committee*, 81st Leg., Reg. Sess. (Minn. 2000), available on audio tape: Hearings Before the Senate Conference Committee on S.F. 3169/H.F. 3311 (Apr. 10, 2000) (tape 1, side B) (comments of Sen. Foley).

67. Diane N. Lye, *What The Experts Say: Scholarly Research On Post-Divorce Parenting and Child Well-Being*, REPORT TO THE WASHINGTON STATE GENDER AND JUSTICE COMMISSION AND DOMESTIC RELATIONS COMMISSION (1999), available at <http://www.courts.wa.gov/parent/chap4.htm>.

68. Carolyn J. Frantz, Note, *Eliminating Consideration of Parental Wealth in Post-Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 235-36 (2000) (arguing for an exception to the general policy of prohibiting wealth as a factor in custody disputes).

69. Fields & Casper, *supra* note 12, at 8 tbl.4.

in the United States lives in poverty.<sup>70</sup>

Until the option of maintaining two custodial homes is available to everyone, primary caretakers living at or below the poverty level and their advocates must choose custody labels and arrangements that best preserve the economic well-being of the parents in order to ensure a custody arrangement in the best interests of the child. This means that primary caretakers must continue to struggle for sole physical custody because child-support guidelines will be applied more favorably for them, provided that their ex-spouses have the ability to pay child support. For those whose ex-spouses cannot pay child support, the sole-custody label will help primary caretakers receive public benefits to provide for the basic needs of their children. For primary caretakers who want to take advantage of the new parenting plan legislation, they must carefully evaluate how the arrangements affect their eligibility for public assistance, which probably excludes a completely shared parenting arrangement. Likewise, they must evaluate their ability to relocate with the child when the primary caretaker finds (better) employment, which means retaining the child-endangerment standard for modification. Moreover, any court considering the imposition of a parenting plan on parties who live at or below the poverty level should consider how the plan will economically affect the ability of the parents to provide for their children's needs.

## VII. CONCLUSION

Efforts at improving custody law have not been neutral, and the class of parents who are primary caretakers, most frequently mothers, face obstacles that are likely to produce unjust placement decisions. Policymakers have denigrated a preference for placement of sole custody with these parents and encouraged demands for joint custody and parenting plans. The danger to children lies partly in the greater probability of judicial decisions, premised on statutory law, that limit the child's enjoyment of a sole custodian who receives adequate child support, has appropriate freedom in selecting employment and residence, and is protected by the permanence of the appropriate custody placement. And partly, the peril will occur in the decision of primary parents to join in stipulations that reflect a poor bargaining position of the

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70. Somini Sengupta, *How Many Poor Children Is Too Many?*, N.Y. TIMES, July 8, 2001, at WK3 (citing 1999 figures).

primary parent and the children. For the future, the sensible development of child-custody standards will reflect greater awareness of the primary-caretaking relationship in the continuing development of child support law, but more particular developments should also occur.

First, more should be known about the actual experiences of parents when the custody of their children is determined as part of their divorce. Research about the primary-caretaker relationship, its characteristics, and means to reliably identify it is needed. Research is also needed to demonstrate the actual peril of primary caretakers, especially mothers, in negotiations leading to stipulations and in judicial determinations of custody. In addition, we should obtain more evidence on the experiences of children whose primary parent relationship is compromised, especially by a reduced child support award that coincides with labeling an arrangement as joint physical custody. Research on the effects of all custodial arrangements on families living at or below the poverty level is particularly warranted.

Such social science research will enlighten legislators and judges on conflicting views as to whether children with primary caretakers are best served by a preference for stable relationships with their primary parents or by giving priority to efforts at maintaining a strong relationship with both parents. It is evident that existing law reflects occasional dominance of both views. Is there good reason for one preference dominating the other?

Second, on information presently at hand, the legislature must be wary of proposals that create a presumption favoring joint physical custody.<sup>71</sup> Trial courts must also be attentive to the primary-caretaking consideration in dealing with custody-standard decisions. Finally, given the challenge, the supreme court should renew its commitment to promoting the best interests of children, whose deepest bond is with a primary parent, by reaffirming its "golden thread" analysis.

The supreme court has not addressed child custody standards in more than a decade. This may be due to the fact that the legal profession tends to dwell on its traditional concerns for crime, business relations, and civil-damages litigation, thereby neglecting the present reality that over half of trial court filings, exclusive of

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71. See generally Hardcastle, *supra* note 56 (evaluating the pitfalls of a presumption and the need to evaluate each case on its own merits).

traffic-regulation matters, deal with personal welfare issues such as divorce, protection of children, juvenile delinquency, and involuntary hospitalization.<sup>72</sup> One of the most important future supreme court issues regards the extent to which the court will limit or uphold the legislative prerogative to declare what is best for a child, keeping in mind the judicial role in determining equity, the court's longstanding deference to trial court discretion in deciding custody questions, and the historic resolve of the court to treat the judicial assessment of a child's interests as paramount to general legislation on placement of child custody.

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72. Gary Crippen, *The Abundance of Family Law Appeals: Too Much of a Good Thing?*, 26 FAM. L.Q. 85, 86 (1992).

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